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Before The
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

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CS Docket No. 01-129

REPLY COMMENTS
OF
RCN CORPORATION

RCN Corporation ("RCN"), by undersigned counsel, herewith submits its Reply Comments in the above-captioned proceeding. RCN filed Initial Comments in this matter on August 3, 2001, providing the Commission with its views on the state of competition in the MVPD industry as well as the principal competitive issues currently faced by RCN. A review of the initial comments of other filers indicates that there is little that is new in the initial filings of the cable incumbents, programmers, trade associations, and overbuilders; each has hewed quite closely to the views presented in prior years. Accordingly, RCN will limit itself in these Reply Comments to a few highlights rather than to a comprehensive review of other filers' initial comments.

From RCN's perspective, there are a few MVPD competition issues of overriding importance:

1. Ease of entry for a new competitor;
2. Access to programming;
3. Ability to negotiate rights of way/franchise/building access agreements; and

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4. Access to utility poles.

Predictably, the incumbent cable industry points to the continuing decline in its share of the national MVPD market – now at about 77-80% – to allege that the market is fully competitive and that the Commission should recognize this change in circumstances. Similarly, the cable industry makes the bold but clearly unjustifiable argument that with less than 80% of the market, cable does not have dominant market power. RCN does not dispute the numbers but believes this overemphasis on national market share is misleading. For a terrestrial competitor like RCN, entry is a market-by-market undertaking. Whether the incumbent cable industry has 99%, 80%, or 77% of the national market is simply irrelevant to assessing the ease of entry for RCN, or any other terrestrial competitor, in its existing markets and in those it would like to enter in the future.¹ RCN invites the Commission to study in depth the MVPD market in Boston, in New York, in Philadelphia, or in Washington, D.C., to determine which segment of the MVPD industry has market power in any of those communities. The answer, of course, would be the incumbent cable operator.²

¹ For this reason AT&T Corp.'s contention that mere market share cannot be equated with market power (Comments, at 10) simply misses the mark. As the Commission emphasized in *Review Of The Prime Time Access Rule*, 11 FCC Rcd 546, at ¶ 24 and n.44 (1995), cited by AT&T, factors such as ease of entry or excess capacity held by competitors or others that would defeat the exercise of market power must be analyzed. RCN agrees that market power must be judged on the basis of the individual circumstances but such judgments, to have any meaning, must relate to a particular market, not to a national view.

² The cable industry's reliance on *Time Warner Entertainment v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000) and *Time Warner Entertainment v. U.S.*, 240 F.3d 1126 (D.C. Cir. 2001), for the proposition that the Commission cannot adopt market-constraining rules without building an adequate record, is fully consistent with RCN's contention that the Commission must study individual markets in detail, or defined segments of the national market, and then adopt rules to facilitate competition in those markets or market segments. Indeed, for some time RCN has been

It is also noteworthy that, while DBS has grown substantially, and is now a significant element of the MVPD market, DBS is not a complete substitute for terrestrial delivery systems due to local programming limitations, line-of-sight, and return-path limitations. A substantial portion of the growth of DBS is occurring in rural areas where DBS is the first, rather than a competitive, offering.³ RCN, on the other hand, is concentrating in urban areas with dense demographics, and DBS, like RCN, has experienced program access difficulties in such markets.

Nothing in the initial comments challenges the primary competitive importance of access to a full line-up of quality programming. While the incumbent industry claims that the programming market is more, rather than less competitive than in prior years, RCN's experience is to the contrary. Indeed, the increasing concentration in cable ownership, coupled with the growth of clustering, exacerbates rather than alleviates, the anticompetitive structure of the programming marketplace.

In short, while in some defined respects the MVPD market is more competitive than it has been, RCN continues to find its entry efforts thwarted in various ways by the entrenched cable/programming industry. Illustratively, Cablevision and Time Warner, the two vertically integrated incumbents in the New York City area, appear to have no programming problems with each other, but RCN, the new-comer, is denied the full range of New York City area professional sports programming.

urging the Commission to carefully explore, for example, the competitive situation in New York City, or the national market for local professional sports programming.

³ See, e.g., DirecTV Comments, at 13 (50% of subscribers are in rural areas).

There is nothing in the other initial comments which refutes RCN's allegations that many MDUs are inaccessible due to widespread anticompetitive arrangements such as incumbent exclusivity arrangements. No other commenter devoted any attention to the pole access problem which is a substantial one, nor did any address in any depth the continuing problem of excessive franchise demands from LFAs, a problem which RCN has urged the Commission, as yet without success, to address proactively. Indeed, as recently reported in the Washington Post, RCN's Washington, D.C. affiliate, Starpower, withdrew from Prince George's County, Md., because the local franchise authorities attempted to impose commercially unreasonable financial burdens on Starpower.⁴

The bottom line is that the MVPD market is indeed more competitive in certain respects than in prior years, and certain segments of the public have benefitted from that competition. To broaden the competitive opportunity, however, the Commission will have to address the issues posed by program access, inside wiring, pole attachments, and LFA overreaching.⁵

Respectfully submitted,

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⁴ Washington Post, August 27, 2001, at B-01.

⁵ RCN's results for the quarter ended June 30, 2001, and its total service connections as of that date, are available at <http://www.rcn.com/investor/press/08-01/08-02-01/08-02-01.html>.

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 5th day of September, 2001, a copy of the foregoing Reply Comments of RCN Corporation was served on the following parties listed below via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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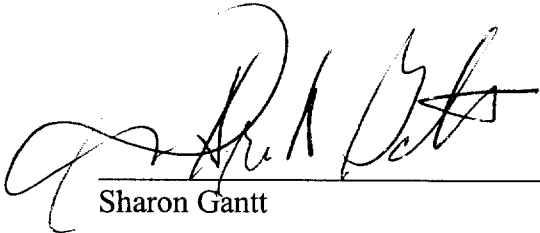
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